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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

COURTNEY GORDON, an individual, on behalf of herself and those similarly situated,

Plaintiff-Petitioner,

vs.

CITY OF OAKLAND, a Municipal Corporation,

Defendant-Respondent.

Case No. C08-01543 WHA

DEFENDANT CITY OF OAKLAND'S MOTION TO DISMISS AND/OR TO ABSTAIN: NOTICE OF MOTION; MEMORANDUM OF POINTS AND AUTHORITIES

Date: May 15, 2008
Time: 8:00 a.m.
Courtroom: 9

TO PLAINTIFF AND HER COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on May 15, 2008 at 8:00 a.m. or as soon thereafter as the matter may be heard in Courtroom 9 on the 19th Floor of the above captioned court, located at 450 Golden Gate Avenue in San Francisco, CA, defendant City of Oakland will and hereby does move the court for an order pursuant to Federal Rule of Civil Procedure 12(b) (6) dismissing plaintiff's complaint. In addition, defendants will and hereby do seek an order that the court abstain from exercising jurisdiction over plaintiff's state law claims under the authority of Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976)

More specifically, the motion is made on the following grounds:

1. Plaintiff's complaint fails to state a claim under the Fair Labor Standards Act (FLSA) because the complaint shows that plaintiff received the statutory minimum wage for her entire tenure with the Oakland Police Department.

2. Plaintiff's claims made under the ostensible authority of 42 U.S. section 1983 must be dismissed because (a) they are not cognizable as actionable claims under section 1983 because Congress has provided a comprehensive enforcement mechanism under the FLSA and (b) they are not cognizable as actionable claims under section 1983 because they seek vindication of state law rights and (c) they are substantively defective.

3. This court should abstain from exercising jurisdiction over plaintiff's state law claims because the identical claims are currently before the California Court of Appeal, First District, Division 2 in the case of City of Oakland v. Hassey, Court of Appeal Case No. 116360, scheduled for oral argument on May 13, 2008.

Dated: April 9, 2008

JOHN A. RUSSO, City Attorney
RANDOLPH W. HALL, Assistant City Attorney
RACHEL WAGNER, Supervising Trial Attorney
CHRISTOPHER KEE, Deputy City Attorney

By: /s/ Christopher Kee
Attorneys for Defendant
CITY OF OAKLAND

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Pursuant to a Memorandum of Understanding negotiated between the defendant City of Oakland (the City) and the Oakland Police Officers' Association, individuals who are hired as police officers with the Oakland Police Department may be required to reimburse the City for the costs of their training in the Oakland Police Academy if they leave their employment with the Department before they have served five years. Complaint, paragraph 5; Exhibit B. Reimbursement costs are calculated on a pro-rata basis—the longer you serve, the less you have to pay if you leave. If you stay five years, you owe nothing. Id.

Plaintiff Courtney Gordon signed a conditional offer of employment agreeing to the reimbursement terms established under the MOU. She was hired as a Police Officer Trainee, paid a salary, and was trained to be a police officer in the Academy for free. Upon her successful completion of the Academy, she was hired as a sworn officer at a salary of $33.50 an hour.

She only served 18 months. By means of this lawsuit, she now seeks to avoid her obligation to reimburse the City for the cost of her training—training for which she was paid, and which is effectively free upon completion of the five years of service. She claims the Conditional Offer violates the Fair Labor Standards Act, various constitutional rights, and a long list of state law provisions.

As developed below, there is no merit to any of these claims. The City is not alone in reaching that conclusion: plaintiff's counsel, who has developed something of

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a cottage industry in bringing these suits[1], made virtually identical allegations against the City through defendant and cross-complainant Keith Hassey in the matter of City of Oakland v. Hassey, Alameda County Case No. 2001-027607. In that case, the state court granted summary judgment to the City, and the matter is presently on appeal before the First Appellate District of the California Court of Appeal. See Defendant's Request for Judicial Notice, Exhibits 1-3.

II. STATEMENT OF FACTS

Plaintiff's complaint asserts the following:

On November 5, 2005, plaintiff signed a conditional offer of employment with the Oakland Police Department, accepting as a condition of employment a provision of the MOU between the Oakland Police Officer's Association and the City of Oakland, that she might be required to reimburse the City for training expenses. The conditional offer set out the pro-rata reimbursement schedule. The offer contained a box that stated "**Yes,** I accept this offer, and understand the conditions which attach to it." Plaintiff checked the "yes" box, signed, and dated the Conditional Offer.

Plaintiff was hired, successfully completed training, and became a sworn police officer in June of 2006. She resigned in January of 2008—less than five years after her date of hire. Upon her resignation, she was informed that she would be required to reimburse the City some $6400 dollars for the cost of her training, in keeping with her signed obligation to repay the City on a pro-rata basis should she leave her employment within five years of being hired. The City allegedly withheld $1950.34 of her final

[1] See Morgan v. County of Yolo, 436 F. Supp. 2d 1152 (E.D.Cal. 2006); Morgan v. County of Yolo, 2006 WL 2692872 (E.D. Cal. 2006); In Re Acknowledgment Cases, 2008 WL 668205 (Cal. App. 2008). These cases involved allegations to those made here and in the Hassey case: that employment agreements obligating law enforcement officers to repay the costs of their training violated federal and state law. The City notes that in the second Morgan v. County of Yolo case, the District Court sanctioned counsel for vexatiously pursuing his action after the County had dismissed its own action to recover the training costs with prejudice.

paycheck.

The MOU provides that trainees in the Academy receive a salary 10% less than the base salary for a police officer. Once plaintiff was hired as a police officer, she was paid $33.50 an hour. The complaint discloses no deductions from her paychecks for training costs during her 18 months of employment, until the final paycheck.

III. LEGAL ARGUMENT

As a threshold matter, plaintiff's claims flow from the implied premise that there is something inherently unfair about requiring police officers to reimburse the City for training costs on a pro-rata basis. There is not.

There are varied situations where employees are subject to a service requirement in exchange for a benefit in the form of training, or payment for schooling. See e.g.; Heder v. City of Two Rivers Wisconsin, 295 F.3d 777, 782-783 (7th Cir. 2002); U.S. v. Williams, 994 F.2d 646, 649-650 (9th Cir. 1993); Wilson v. Clarke, 470 F.2d 1218 (1st Cir. 1972); see also Brandon S. Long, Note, Protecting Employer Investment in Training: Noncompetes vs. Repayment Agreements, 54 Duke L.J. 1295, 1301 (2005).

This is a completely unremarkable practice. It is hardly unusual for an employer to condition employment on specialized training. Attorneys, for instance, must graduate from law school before being admitted to practice and hired at a firm; doctors must graduate from medical school. No one could rationally consider that inequitable, or imagine that it gives rise to an obligation on the part of the eventual employer to pay for the cost of that training. As Judge Easterbrook frames the question, "If an employer may require employees to pay up front, why can't an employer bear the expense but require reimbursement if an early departure deprives the employer of the benefit of its bargain?" Heder v. City of Two Rivers, 295 F.3d at 781.

That is precisely the question raised by plaintiff's suit here, with the added factor that plaintiff was paid a salary to receive free training at one of the most highly

respected training facilities for police officers in the State of California, but bridles at having to honor her reimbursement obligation now that she has changed her mind.

As developed below, the answer to Judge Easterbrook's question is yes--employers can obtain the benefit of such an agreement. There is nothing inequitable, and certainly nothing unlawful, about that arrangement.

Turning to the plaintiff's specific causes of action, there is no merit to her claims, and the matter should be dismissed.

A. The Complaint Does Not State A Violation Of The FLSA Because On Its Face It Shows That Plaintiff Received The Minimum Wage For Each Pay Period.

Plaintiff's FLSA claims are based on the convoluted assertion that, because at the time of her execution of a conditional offer, at some point in the future plaintiff might have been obligated to repay the costs of her training, the conditional offer in actuality was a de facto deduction of her wages beginning with her first paycheck in violation of the FLSA. This is so, evidently, even though plaintiff was paid in full during her entire tenure as a police officer trainee, and as a sworn officer, up to the last paycheck, at which point there was allegedly a deduction made. In other words, plaintiff claims the FLSA is violated by the Conditional Offer because employees who may at some point choose not to honor their agreement might be subject to some sort of deduction at some time in the future.

Plaintiff's "de facto" deduction theory of fails to state a claim under the FLSA. The FLSA merely requires employers, at the most basic level, to pay employees a minimum wage. 29 U.S.C. section 206(a)(1); Adair v. City of Kirkland, 185 F.3d 1055, 1062 fn 6. Here, the complaint expressly states that plaintiff was paid $33.50 an hour—almost 6 times the $5.85 minimum wage established under the FLSA. The face of the complaint thus reveals that, in keeping with its obligations under the FLSA, plaintiff received the minimum wage in each pay period—indeed, she received substantially

more.

Plaintiff does assert that $1950.00 was withheld from her last paycheck. She does not allege facts, though, showing that she wasn't paid the minimum wage in her final paycheck; she alleges only that a specific amount was withheld. This too is lawful under the FLSA. Nothing in the FLSA prevents an employer from conditioning recovery of training costs from an employee on a period of service, so long as the employee is paid a minimum wage. Heder v. City of Two Rivers Wisconsin, 295 F.3d 777, 782-783 (7th Cir. 2002); Chao v. Bauerly, 2002 WL 1923716 (D. Minn. 2005). Aside from plaintiff's peculiar "de facto" argument, there is nothing in the complaint to support a claim that plaintiff did not receive the statutory minimum wage during her entire tenure with OPD, even calculating in the amount withheld.

Finally, to the extent that plaintiff seeks injunctive relief under the FLSA against future enforcement of the Conditional Offer, plaintiff, as an individual employee does not have standing; only the Secretary of Labor is authorized to seek such relief. Barrentine v. Arkansas-Best Freight System, 750 F.2d 47, 51 (8th Cir. 1984).

B. Plaintiff Has Failed To State A Claim Under 42 U.S.C. Section 1983

Section 1983 creates a right of action for vindicating federal rights. Albright v. Oliver, 510 U.S. 266, 271 (1994). Plaintiff's Second Cause of Action seeks relief for alleged violations of her rights under (1) the FLSA (2) provisions of the California Labor Code (3) the "free association" clause of the 1st Amendment of the U.S. Constitution (4) The "privileges and immunities clause" found in Article IV, Section 2 of the U.S. Constitution and (5) her rights under the 5th and 14th Amendments. None of these is sufficient to support a claim under section 1983.

1. Claims Under The FLSA Are Not Actionable Under Section 1983.

Section 1983 is unavailable where the underlying federal statute contains its own comprehensive enforcement mechanism. Kendall v. City of Chesapeake, Virginia, 174

F.3d 437, 440 (4th Cir. 1999). The FLSA is such a statute. Id. at 440-442. It cannot also serve as the underlying basis for a section 1983 claim, and plaintiff's claims in that regard must be dismissed. Id.

2. State Law Claims Are Not Actionable Under Section 1983.

Section 1983 is only available to vindicate violations of federal laws; claims based on state law are not cognizable. See e.g. Sweaney v. Ada County Idaho, 119 F.3d 1385, 1391 (9th Cir. 1997); Barry v. Fowler, 902 F2d 770, 772-773 (9th Cir. 1990). To the extent plaintiff's complaint rests on violations of state law, it is not a viable section 1983 action.

3. There Are No Sufficient Allegations Supporting A Claim Under The First Amendment Right Of Free Association.

Plaintiff's complaint avers in the most general terms that, by requiring her to sign a conditional offer that includes a promise to repay the cost of her training on a pro-rata basis should she leave the department after 5 years, the City has violated her rights of free association under the First Amendment. How this is accomplished, plaintiff does not say. There is indeed nothing in the complaint that suggests any action of the City has impaired plaintiff from associating with anyone. As noted bove, the possibility that a recipient of a government benefit (and being paid a salary to receive POST certified training certainly qualifies as a government benefit) may be required to fulfill a contractual obligation, or else repay the cost of the benefit, is hardly unusual. See e.g. U.S. v. Williams, 994 F.2d at 649-650 (recipient of federal scholarship liable for treble damages for failure to complete service requirement).

Plaintiff was of course free to decline the conditional offer, premised as it was on repayment of a pro-rata portion of the costs of training should she leave OPD before serving 5 years, and seek employment elsewhere. Plaintiff obviously thought the deal was attractive at the time—the fact that she now seeks to shirk her contractual

obligation is hardly a constitutional injury.

Moreover, there was nothing unduly coercive about the conditional offer. It was clearly mutually advantageous—plaintiff was paid to receive premium POST certified training to be a police officer for free, in exchange for which she agreed to work for a minimum of five years, or else repay the city on a pro-rated basis for those costs. There is no hint of a restraint on plaintiff's First Amendment rights to freely associate.

4. There Are No Allegations Implicating The Privileges and Immunities Clause.

The purpose of the privileges and immunities clause is to "place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." International Organization of Masters, Mates & Pilots v. Andrews, 831 F. 2d 843, 845 (9th Cir. 1987). It seeks "to ensure the unity of the several states by protecting those interests of nonresidents which are fundamental to the promotion of interstate harmony." Id. There is nothing at all in plaintiff's complaint that implicates the scope and purpose of the privileges and immunities clause, and those claims must be dismissed as well.

5. The Complaint Fails To Sufficiently Allege A "Taking" Under The Fifth and Fourteenth Amendments.

Plaintiff claims that in signing the Conditional Offer, she has suffered an injury under the Fifth and Fourteenth Amendments of the U.S. Constitution. Here again, the basis for that claim is not entirely clear. While she asserts confusingly that those amendments protect her "property interest in free and clear wage payment without just compensation", the City presumes that she meant to assert that the conditional offer somehow constitutes a "taking." If that is in fact what plaintiff meant to say, it is hard to see how signing a conditional offer of employment—which is the express basis for the claim (see Complaint, paragraphs 33-34)—works any deprivation at all. Indeed, under

that agreement she is merely obligated to repay, on a pro-rated basis, the substantial investment in time and materials that the City has made in her training to be a police officer—training that will serve her well should she choose (as she evidently has) to work elsewhere in law enforcement. Repayment of a contractual obligation does not constitute a taking under any law that the City is aware of. Plaintiff certainly can claim no property interest in breaching a contract.

C. This Court Should Abstain From Exercising Jurisdiction Over Plaintiff's State Law Claims, Because The Identical Issues Are Presently On Appeal In State Court.

Plaintiff's Third through Tenth Causes of Action are state law claims arising under the California Labor Code, Civil Code, and Business and Professions Code. As explained above, these same claims were brought unsuccessfully against the City of Oakland by means of a cross-complaint filed by plaintiff's counsel in the case of City of Oakland. v. Hassey. That case is currently before the First District of the California Court of Appeal, and scheduled for oral argument on May 13, 2008. Thus, the identical legal theories advanced here will be considered by the state court in plaintiff's appeal.

Given the fact that these issues of state law are presently before a state appellate court, this court should exercise its discretion and abstain from considering plaintiff's state law claims in this action. Colorado River Water Conservation District v. United States, 424 U.S. 800, 818-819 (1976).

The Ninth Circuit has concluded that abstention under the Colorado River doctrine rests on considerations of "wise judicial administration, conservation of judicial resources and comprehensive disposition of litigation." Fireman's Fund Insurance Company v. Quackenbush, 87 F.3d 290, 297 (9th Cir. 1996). A district court may consider several factors, including such questions as whether the state court first assumed jurisdiction over the property in question, the order in which jurisdiction was obtained by the concurrent forums, whether federal or state law provides the rule of

decision on the merits, whether the state court proceedings are inadequate to protect the federal litigants rights and the prevention of forum shopping. See Colorado River, 424 U.S. at 818-819; Moses H. Cone Mem'l. Hosp. v. Mercury Const. Corp., 460 U.S. 1, 23, 26; Travelers' Indem. Co. v. Madonna, 914 F.2d 1364, 1371 (9th Cir. 1990).

Here these factors support abstention with respect to plaintiff's state law causes of action. The identical state law claims at issue here are presently before the First District Court of Appeal, and were first raised in the state forum. State law will obviously provide the rule of decision on the merits of those claims. The state court cannot in any way be deemed an inadequate forum for interpretation of the state law issues that plaintiff raises here. And finally, to the extent that plaintiff's counsel here is also counsel in the Hassey case, there is certainly at least the inference of forum shopping[2]—having been unsuccessful in state court, plaintiff's counsel now seeks a more favorable airing in federal court.

These factors support abstention in this case with respect to plaintiff's state law claims, and this court should dismiss the Third through Tenth causes of action.

IV. CONCLUSION

Plaintiff entered into an agreement with the City that by any measure was highly advantageous to her: she got paid to learn to be a police officer. As part of that agreement, she was obliged to work for the City for a period of time or else repay the training costs on a pro-rata basis—an obligation established through a negotiated MOU in recognition of the fact that "a substantial number of persons" in the past had accepted the benefit of the paid training program, and then left the City. She was happy to accept the benefit, but unwilling to accept the responsibility. She now seeks relief from this court, based on legal theories that have no merit, and are under concurrent consideration in the

[2] As noted in footnote 1 above, plaintiff's counsel has brought similar suits in several other jurisdictions in the state, to date, as far as it appears, unsuccessfully.

state appellate court. Under these circumstances, the City respectfully urges the court to grant its motion, and dismiss this case.

Dated: April 9, 2008

JOHN A. RUSSO, City Attorney
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CHRISTOPHER KEE, Deputy City Attorney

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